

# memorandum

DATE: October 18, 1999

REPLY TO

ATTN OF: Office of Environmental Policy and Assistance (EH-41):Bascietto:6-7917

SUBJECT: **EPA GUIDANCE ON TRANSFER OF FEDERAL PROPERTY UNDERGOING CERCLA REMEDIAL ACTION**

TO: Distribution

**PURPOSE  
OF THIS  
MEMO**

To notify DOE elements of guidance from the Environmental Protection Agency (EPA) that establishes the process by which EPA Regions will review requests from landholding Federal agencies transferring property to:

- defer the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) covenant, which heretofore required all necessary remedial actions to be completed prior to the transfer of real property
- issue (rather than defer) the required deed covenant *before* cleanup objectives have been met, provided the selected remedial action is “operating properly and successfully.”

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**BACKGROUND**

CERCLA Section 120 subjects Federal agencies to cleanup requirements issued under the National Contingency Plan, including those governing remedial actions taken at facilities listed on the National Priorities List (NPL). Historically, the Section 120(h)(3) covenant required that for each transfer of federally-owned property on which hazardous substances have been stored for one year or more, or were known to have been released, or disposed of, Federal agencies obtain EPA Regional office approval that all necessary remedial action (with respect to any substances remaining on the property) had been taken before the date of such transfer.<sup>1</sup> CERCLA 120(h)(3) also required that the covenant be placed in each property transfer deed.

In October 1992, the Community Environmental Response Facilitation Act (CERFA) amended CERCLA Section 120. These amendments, among other things, clarified that all necessary remedial actions had been taken if construction and installation of an approved remedial action had been completed and the remedy was demonstrated (to EPA) to be “operating properly and successfully.”

On June 16, 1998, the Agency issued guidance titled *EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3) – (Early Transfer Guidance)*. Except for federal-to-federal property transfers and transfers of uncontaminated property, this guidance applies to transfers by deed of contaminated real property (or parcels thereof) that is owned by a Federal agency and is listed on the NPL, and at which all of the necessary remedial actions have *not* yet been completed.

In contrast, at facilities implementing a final remedial action, or certain ongoing removal actions, transferring agencies can issue (rather than defer) the required deed covenant before cleanup objectives have been met, provided they can demonstrate that the action is operating properly and successfully. In these instances, persons should refer to a second EPA guide, *Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully Under CERCLA Section 120(h)(3)*, when preparing such demonstrations.

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<sup>1</sup> Real property transfers include ownership changes (e.g., donations, exchanges, and disposals), as well as those situations that ownership does not change (e.g., withdrawn land is returned to public domain, and outgrants such as easements, leases, licenses, and permits. See DOE guidance *Cross-Cut Guidance on Environmental Requirements for DOE Real Property Transfers, October 1997 (DOE/EH-413/9712)*.

<b>KEY ELEMENTS:</b>	<p>Although intended as guidance to EPA Regions evaluating site-specific requests or demonstrations, these documents can guide Federal agencies transferring contaminated real property (or parcels thereof) that is (1) listed on the NPL and for which all of the necessary remedial actions have <i>not</i> yet been completed; or (2) undergoing a long-term CERCLA response action that has not yet achieved the cleanup objectives, but for which the covenant has been fulfilled because the transferring Agency can demonstrate (to EPA) that the selected action is operating properly and successfully.</p>
Early Transfer Guidance	<p>At those facilities transferring contaminated real property before all of the necessary remedial actions have been completed, the landholding Federal agency can follow the deferral of the covenant request process outlined in EPA's <i>Early Transfer Guidance</i>. This guidance presents the process which EPA Regions, with the concurrence of the Governor of the affected state, are expected to use to determine whether the transferring agency has submitted a Covenant Deferral Request (CDR) that contains the requisite information and, thereby, supports a determination (by EPA) that such property is suitable for transfer.</p> <p>The deferral process begins when the transferring agency notifies the EPA Administrator or designee and the Governor of the affected state of its intent to request a covenant deferral and invites them to participate in developing, reviewing, and commenting on the draft CDR.<sup>2</sup> The transferring Federal agency then notifies (using EPA's prescribed content and a publication of general circulation in the vicinity of the property) the public, existing advisory boards, and affected local governments of the CDR, which contains all eight of EPA's recommended components, as follows:</p> <ul style="list-style-type: none"> <li>Property Description</li> <li>Nature/Extent of Contamination</li> <li>Analysis of Intended Land Use During the Deferral Period</li> <li>Results from a Risk Assessment</li> <li>Response Action and Operation and Maintenance Requirements</li> <li>Contents of Deed/Transfer Agreement</li> <li>Responsiveness Summary</li> <li>Transferee Response Action Assurances and Agreements.</li> </ul> <p>Based on the draft CDR, and as required under CERCLA Section 120(h)(3)(C), EPA will determine whether the property is suitable for transfer. EPA must find that the property will be used in a manner that is suitable for the site, its intended use is consistent with protection of human health and the environment, and the deferral and early transfer will not substantially delay any necessary response action at the property.</p> <p>EPA's <i>Early Transfer Guidance</i> indicates that sites having an ongoing or planned response action should submit, as part of the "Response Action and Operation and Maintenance Requirements" component of the CDR, a <b>projected date</b> for demonstrating that the cleanup will be "operating properly and successfully." On the other hand, under EPA's Operating Properly and Successfully guidance, landholding Federal agencies at sites with ongoing response actions that can adequately demonstrate their actions <b>are</b> "operating properly and successfully" can elect to issue, rather than defer, the CERCLA-required deed covenant.</p>
Operating Properly and Successfully	<p>Landholding Federal agencies at sites (or parcels thereof) implementing response actions<sup>3</sup> that have not yet met the selected cleanup objectives can nonetheless elect to issue the CERCLA-required deed covenant warranting that all necessary remedial actions have been taken, provided they can adequately demonstrate (to EPA) that their selected cleanup is "operating properly and successfully." When preparing this demonstration, agencies should refer to EPA's <i>Guidance for</i></p>

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<sup>2</sup> For DOE properties located in Indian country within tribal jurisdiction, EPA guidance indicates its Regional offices are responsible for obtaining specific guidance from EPA Headquarters, the Federal Facilities Restoration and Reuse Office, and the American Indian Environmental Office.

<sup>3</sup> For the purposes of this guidance, response actions include final (not interim) remedial actions, or ongoing CERCLA removal or RCRA corrective actions (including those taken under State RCRA/CERCLA-based authorities) that will serve as the sole or final response, addressing all pathways and contaminants of concern.

*Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully Under CERCLA Section 120(h)(3).*

To be “operating properly and successfully,” a transferring agency must satisfy a two-part demonstration. First, the agency must demonstrate that they have constructed and installed the remedial action in accordance with an approved remedial design. Second, it must demonstrate that the remedy is operating properly and successfully based on four site-specific considerations:

- Risk to Public Health and Environment
- Enforceability (i.e., ability to require continued operation of and/or enhance the remedy)
- Technology Reliability
- Site Characterization.

Relative to “operating properly and successfully,” EPA indicates that this phrase involves two separate concepts. A remedial action is operating “properly” if it is performing to design specifications (e.g., flow rate, temperature range). That same system is operating “successfully” if its process addresses the particular contaminant(s) it was constructed to remediate and thus, will achieve the cleanup levels or performance goals delineated in the site-specific decision document.

Additionally, in order to be “successful,” the selected remedy must be operating in a manner that is protective of human health and the environment. Where more than one remedial action is required for a parcel, all such actions must operate properly and successfully, and EPA will evaluate the suite of actions comprehensively prior to transfer to determine whether all remedial actions have been taken.

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**AVAILABILITY  
OF  
INFORMATION**

The “*EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)*” is available for viewing/downloading on the EPA Federal Facilities Restoration and Reuse Office (FFRRO) website at <http://www.epa.gov/swerffrr/doc/hkcover.htm>. The “*EPA Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully under CERCLA 120(h)(3)*” is available on the FFRRO website at <http://www.epa.gov/swerffrr/doc/896mm.htm>. Additional information on transferring real property can be found in DOE guidance “*CERCLA Requirements Associated with Real Property Transfers*” and “*Cross-Cut Guidance on Environmental Requirements for DOE Real Property Transfers*.” These can be accessed using the Office of Environmental Policy and Assistance (EH-41) Web site at <http://tis.eh.doe.gov/oepa/guidance/cercla/Rtrans.pdf> and <http://tis.eh.doe.gov/oepa/guidance/rcra/Property/Property.pdf>, respectively.

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**QUESTIONS  
OR  
COMMENTS**

Questions or comments addressing the EPA guidance or the information presented therein may be directed to John Bascietto of my staff by:

- Calling (202) 586-7917,
- Faxing messages to (202) 586-3915, or
- Communicating electronically, via Internet, to [john.bascietto@eh.doe.gov](mailto:john.bascietto@eh.doe.gov).

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